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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 REYCEL PEREZ-MARTINEZ,

9 Petitioner,

10 v.

11 MARGARET GILBERT,

12 Respondent.

CASE NO. C15-5950 BHS-TLF

ORDER ADOPTING REPORT
AND RECOMMENDATION

13 This matter comes before the Court on the Report and Recommendation (“R&R”) of the Honorable Theresa L. Fricke, United States Magistrate Judge (Dkt. 35) and
14
15 Petitioner’s objections to the R&R (Dkt. 36).

16 On July 25, 2017, Judge Fricke entered the R&R, recommending that the Court
17 dismiss Petitioner’s claims based on allegations of withholding of evidence in violation
18 of *Brady v. State of Maryland*, 373 U.S. 83 (1963) and failing to provide a proper
19 interpreter. Dkt. 35. Judge Fricke based her R&R on the fact that Petitioner failed to
20 exhaust these claims in state court and they are procedurally barred. *Id.* On August 10,
21 2017, Petitioner objected to the R&R. Dkt. 36.
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1 The district judge must determine de novo any part of the magistrate judge's
2 disposition that has been properly objected to. The district judge may accept, reject, or
3 modify the recommended disposition; receive further evidence; or return the matter to the
4 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

5 Petitioner does not argue against the R&R's conclusion that his *Brady* and
6 interpreter-based claims were not properly raised in his motion to the Washington State
7 Supreme Court for discretionary review. Dkt. 36 at 3. Instead, Petitioner argues that his
8 default should be excused for cause. *Id.* at 3–4. However, despite recognizing that
9 “cause” must be comprised of “some objective factor external to the defense,” *see* Dkt.
10 36 at 3–4 (quoting *McCleskey v. Zant*, 499 U.S. 467, 493 (1991)), Petitioner does not
11 identify any objective factor external to his own failure to raise these issues in his motion
12 for discretionary review. Petitioner attempts to blame his default on the fact that his
13 personal restraint petition and direct appeal were consolidated before the Washington
14 State Court of Appeals. Dkt. 36 at 5. But this does not highlight any plausible external
15 interference with his ability to properly raise all of his claims in his motion for
16 discretionary review of the decision by the Court of Appeals. Accordingly, Petitioner's
17 objections are denied and the R&R is adopted.

18 Additionally, the Court denies Petitioner's request for a certificate of appealability.
19 A certificate of appealability may issue only if Petitioner has made “a substantial
20 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2)–(3). A petitioner
21 satisfies this standard “by demonstrating that jurists of reason could disagree with the
22 district court's resolution of his constitutional claims or that jurists could conclude the

1 issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v.*
2 *Cockrell*, 537 U.S. 322, 327 (2003). Petitioner has failed to show that reasonable minds
3 could differ on whether (1) he defaulted his *Brady* and interpreter-based claims or (2) his
4 default was caused by factors external to his own neglect.

5 The Court having considered the R&R, Petitioner’s objections, and the remaining
6 record, does hereby find and order as follows:

7 (1) The R&R is **ADOPTED**;

8 (2) Petitioner’s claims based on allegations of the prosecution withholding of
9 evidence in violation of *Brady v. State of Maryland*, 373 U.S. 83 (1963), and the State
10 failing to provide a proper interpreter are **DISMISSED**;

11 (3) Petitioner’s request for a certificate of appealability on these issues is
12 **DENIED**; and

13 (3) This matter is **REMANDED** to the Honorable Theresa L. Fricke, United
14 States Magistrate Judge, to consider the appointment of counsel and Petitioner’s
15 remaining claims.

16 Dated this 30th day of August, 2017.

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19 BENJAMIN H. SETTLE
20 United States District Judge
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